Supreme Court, U.S.
FILED

No. 99- 99 853 NOV 17 1999

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IN THE

# Supreme Court of the United States

U S WEST, INC.; U S WEST MANAGEMENT PENSION PLAN and U S WEST COMMUNICATIONS,

*Cross-Petitioners,*

*v.*

DONALD J. FARR; GREGORY H. ISHMIEL; ROD W. TRACY; WILLIS L. RADER; JOSEPH T. DEAN; ROBERT HEUSER and JEANETTE P. NEUFELD,

*Cross-Respondents.*

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Is the District Court's factual finding that there has not been a breach of fiduciary duty under ERISA, which finding was decided on motion based on a stipulated record in lieu of a bench trial, subject to *de novo* review?

## STATEMENT PURSUANT TO RULE 29.6

Cross-Petitioner, U S WEST Communications, Inc., is a wholly owned subsidiary of U S WEST, Inc. Cross-Petitioner U S WEST, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

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## OPINIONS BELOW

On June 15, 1998, the Ninth Circuit Court of Appeals entered its decision in *Farr v. U S WEST, Inc.*, 151 F.3d 908 (9th Cir. 1998) (attached to the Petition as Appendix "A", at 1-17). This decision affirmed the District Court's Opinion and Order dated September 3, 1996, in which the District Court entered summary judgment for Respondents/ Conditional Cross-Petitioners (hereinafter "Respondents") and reaffirmed findings of fact and conclusions of law it made on a stipulated record in December, 1992. A copy of the District Court's September 3, 1996 Opinion and Order (and judgment entered thereon) is attached to this Conditional Cross-Petition as Appendix "A" at pages 1a-13a. The District Court's December, 1992 opinion containing its findings of fact and conclusions of law is reported at 815 F. Supp. 1364 (D. Or. 1992).

On November 18, 1998, the Ninth Circuit issued an order granting a petition for rehearing and raising three questions as to which it requested letter briefing. Petition, Appendix "D", at 22-23. On July 9, 1999, the Ninth Circuit issued an order vacating the November 18, 1998 order, denying the petition for rehearing, rejecting a suggestion for rehearing *en banc*, and stating that a separate order amending the June 15, 1998 order would issue. Petition, Appendix "C", at 20-21. On July 15, 1999, the Ninth Circuit issued an order amending the June 15, 1998 opinion. Petition, Appendix "B", at 19-20 (reported at 179 F.3d 1252 (9th Cir. 1999)).

A prior opinion of the Ninth Circuit Court of Appeals is reported at 58 F.3d 1361 (9th Cir. 1995). A prior opinion of the District Court is reported at 815 F. Supp. 1360 (D. Or. 1992).

## STATEMENT OF JURISDICTION

The original Petition for Writ of Certiorari was docketed on October 18, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court and is conditional upon this Court's grant of Petitioners' petition for a writ of certiorari.

## STATUTES OR OTHER PROVISIONS INVOLVED

None.

## STATEMENT OF THE CASE

### A. Introduction

Petitioners are former managers at U S WEST Communications, Inc. ("Communications"), a subsidiary of U S WEST, Inc. ("U S WEST"). They are former participants in the U S WEST Management Pension Plan (the "Plan") who voluntarily retired in 1990 pursuant to an early retirement incentive program under the Plan known as "5+5". The 5+5 program granted an extra 5 years of service credit and 5 years of age credit to eligible managers, and offered additional benefits to those who elected early retirement under the Plan during a "window period." The program was designed to induce a reduction in the management-level work force at U S WEST in a dignified manner, by dramatically increasing the pension benefits of those who elected the early retirement option. Managers retiring under 5+5 could elect to receive benefits in the form of an annuity or in an actuarially equivalent lump sum (*i.e.*, the present value of the future annuity payments). Petitioners each elected to retire under 5+5, and chose the lump sum.

This dispute arose because the lump sum pension benefits Petitioners received under 5+5 (ranging from $275,000 to $530,000), combined with the other retirement benefits U S WEST provided, were so substantial that a portion exceeded the distribution limitations imposed by Internal Revenue Code (26 U.S.C.; hereinafter, the "Code") Section 415 on "qualified" retirement plans, such as the Plan. Thus, although Petitioners were paid their entire benefit, the Code precluded them from "rolling over" the "excess" or "non-qualified" portion of their lump sum on a tax-deferred basis into an individual retirement account ("IRA"), and required them to pay income tax immediately on that portion. (Had Petitioners chosen annuities, taxes would have been deferred (not avoided) until distribution of annuity payments to them.) When the Plan administrator, the U S WEST, Inc. Employees' Benefit Committee ("EBC"), became aware of this impact on participants who (like Petitioners) elected lump sums, it reduced the discount rate for the "non-qualified" benefits, thus providing a substantially larger lump sum benefit than Petitioners would otherwise have received. The EBC believed, based on independent actuarial advice, that this adjustment would make Petitioners actuarially whole. [1]

The parties brought cross-motions for summary judgment presented on a stipulated factual record (developed after extensive discovery) to the District Court, which decided the cross-motions in lieu of a bench trial. The District Court entered findings of fact and conclusions of law,

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1. The Ninth Circuit did not disturb the District Court's factual findings that the actuary's advice was "reasonable under the circumstances and proper," and that using a lower discount rate "compensated for [Petitioners'] losses on the future income stream." 815 F. Supp. 1364, 1374 (D. Or. 1992).

upholding the EBC's denial of the claims, based in part on a factual finding that Respondents had not breached any fiduciary duty. Although this factual finding was amply supported in the record, on appeal the Ninth Circuit applied the *de novo* standard of review rather than the clearly erroneous standard, and reversed the District Court's factual finding based on its own review of the record. Because the issues for review presented in the Petition would be moot but for the Ninth Circuit's error in reviewing the District Court's findings *de novo*, Respondents urge that this Court accept for review in the first instance the threshold issue raised in this Conditional Cross-Petition if the Court accepts for review any of the issues raised in the Petition.

## STATEMENT OF FACTS

### A. The Plan and Its Administration

The Plan [2] is a tax-qualified defined benefit pension plan pursuant to Code Section 401(a) (26 U.S.C. § 401(a)) and ERISA Sections 3(2) and (35) (29 U.S.C. §§ 1002(2) and (35)). The requirements that a plan must meet to remain tax-qualified under Code Section 401(a) include ensuring that the benefits paid to individual participants do not exceed the limitations described in Section 415. Code § 415(a). Benefits paid under a plan that would exceed the Section 415 limitations are called "non-qualified" or "excess" benefits.

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2. The Plan, which covered only managers, merged with the U S WEST Pension Plan, which had covered non-managers, effective in 1993. The surviving entity, the U S WEST Pension Plan, has continued to feature materially the same operative terms, language, and administrative structure during the pendency of this case.

U S WEST is the "plan sponsor" of the Plan, as defined in ERISA Section 3(16)(B) (29 U.S.C. § 1002(16)(B)), and a "named fiduciary" as defined in ERISA Section 3(21) (29 U.S.C. § 1002(21)). Communications helps fund the Plan, provides ministerial help to the EBC and, at EBC direction, pays from corporate assets Plan benefits that exceed the Section 415 limitations. The EBC is the named fiduciary responsible for Plan operations and administration; for example, it decides claims, exercises discretion in interpreting Plan terms, ensures compliance with reporting and disclosure laws, and administers the excess benefit provision.

## B. The Plan's Excess Benefit Provision and Its Administration

Paragraph 4.9 of the Plan provided:

> The portion of any pension or survivor annuity with respect to any participant in excess of the applicable [Code Section 415 limit] shall be paid by the Participating Company which last employed such participant, directly to the participant or beneficiary entitled thereto and shall be charged to its operating expense accounts when and as paid.

The EBC administers this provision as part of Plan administration. It determines the total benefits payable to a retiring participant and which of those benefits (if any) must, under Section 415 of the Code and paragraph 4.9 of the Plan, be paid as excess benefits. If excess benefits are payable, it decides which U S WEST company is to be charged and determines the amount to pay. The only roles played by the

U S WEST companies with respect to excess benefit distributions are: (1) to issue checks as directed by the EBC; and (2) to report the excess benefit amounts to the State and Federal Governments for income tax purposes.

### C. Disclosure of Possibility of Excess Benefit Distributions

The EBC issued a restated summary plan description ("SPD") for the Plan on July 1, 1989, and mailed it to all participants several months before the 5+5 offering. The SPD advised that Plan benefits could exceed legal limits on qualified distributions and that excess benefits could not be paid from the Plan's trust, but that the companies' intent (subject to change) was to pay any excess benefits from operating assets. This statement confirmed an earlier notice mailed to all participants in 1987.

### D. Differences Between Qualified and Excess Benefit Distributions

The Section 415 limitations do not have any impact on a distribution that takes the form of an annuity, even if it includes excess as well as qualified benefits. Annuity payments are taxable as personal income when and as received. Qualified and excess *lump sum* benefits are both taxable, but they are given different tax treatment regarding whether the tax can be deferred. Under applicable tax law, excess lump sum benefits cannot be "rolled over" into IRAs and are subject to immediate taxation. Qualified benefits can be "rolled over" into an IRA or another qualified plan. If so rolled, the benefits are eligible for continued income tax deferral, rather than subject automatically to immediate taxation. Qualified benefits are then taxed when paid to the participant.

## E. The 5+5 Plan Amendment

Before January 1, 1990, the Plan paid benefits (except those in *de minimis* amounts) in the form of an annuity only. On November 29, 1989, U S WEST's Board of Directors authorized the EBC to adopt an amendment that would add five years of age credit and five years of service credit for purposes of calculating Plan benefits for eligible employees. In addition, the amendment was to offer such employees an election in January 1990 to retire with numerous other pension enhancements and to elect to receive these benefits in lump sum form. The EBC adopted the "5+5" Amendment effective January 1, 1990, selecting an 8% discount rate for valuing the lump sum option. (The higher the discount rate, the lower the lump sum.)

Once made, elections to retire under 5+5 were irrevocable. All seven Petitioners elected in January 1990 to retire under 5+5, and chose lump sum benefits in lieu of an annuity.

## F. Why the 5+5 Materials Did Not Specifically Address Excess Benefit Issues

The EBC was responsible for the content of all information provided to employees about 5+5. The EBC explained 5+5 primarily in a Bulletin supplementing the SPD that was mailed on or about December 18, 1989, to participants eligible for 5+5, including Petitioners. The Bulletin contained a brief, general summary of the lump sum distribution option, and described generally the rules most likely to affect the bulk of eligible participants, such as the ability to "roll over" all or part of a lump sum distribution on a tax deferred basis to an IRA. Appropriately,

the Bulletin did not purport to give tax advice. Instead, it informed eligible participants that the tax issues related to the election were complex and advised participants to review their SPD and to secure advice about the tax effects of 5+5 distributions from professionals.

The U S WEST Pension Staff, under the direction of the EBC, prepared the SPD and the Bulletin. Although some Pension Staff members were aware that some eligible employees might, if they elected 5+5, receive benefits that exceeded the Section 415 limits, the Bulletin did not address this issue, for several reasons.

First, because the purpose of the Bulletin was to supplement rather than restate the SPD, the Bulletin advised employees what was new in 5+5 and directed them to review the SPD — which described the effect of the Section 415 limitations — before making their 5+5 election. Second, the Pension Staff believed that, among some 6,000 eligible participants, the number whose benefits would exceed the limits was insignificant, that the amount of any excess benefits would also be insignificant, and that most employees electing 5+5 would apply for benefits in annuity form (making the differences between qualified and excess benefits irrelevant). This was balanced against the concern that raising the Section 415 issue (which would apply to few participants) would confuse all participants because of its complexity. Thus, the staff rationally concluded that expressly notifying eligible participants to seek tax advice from professionals, on balance, provided the most useful notice to all of the participants who received the Bulletin. Third, the Pension Staff sent participants, along with the Bulletin, Statements of Estimated Benefits that were expected to alert professional advisers to any possible Section 415 issue.

## G. The EBC's Discovery Of and Action to Remedy the Excess Benefit Problem

In late January 1990, shortly before the election "window" period closed, the Plan's actuary reported to the Executive Director of Human Resources that he had spoken with a participant whose 5+5 lump sum benefit would substantially exceed the Section 415 limits. This suggested that Section 415 issues might be more significant than the Pension Staff had anticipated when it sent the Bulletin. The actuary proposed lowering the discount rate on the excess benefits from 8% to 5.5% or 6% as a solution. According to the independent actuary, using a 5.5% to 6% discount rate — which would increase the amount of excess benefits — would offset the effect of immediate taxability of those benefits. The EBC accepted the actuary's advice, but decided to use a lower, 5.25% discount rate, thus increasing the benefits payable even more than the independent actuary had suggested. The District Court found (and the Ninth Circuit did not disturb this finding) that the EBC's action in this regard "compensated for the losses on the future income stream" caused by the acceleration of tax. 815 F. Supp. at 1374.

## H. Notices to Participants About the Excess Benefit Problem

The Pension Staff, pursuant to EBC direction, notified the affected group of the amounts of their qualified and excess distributions and told them how the EBC had acted to offset the impact of Section 415. The benefits were then distributed.

*A number of participants, including several of the* Petitioners, called the Pension Staff to complain about their unanticipated immediate tax liability. Some pursued claims under the Plan's claims review procedure. Although the claimants asserted that the EBC's action (of lowering the discount rate) had not made them whole, none argued that the EBC acted unreasonably in adopting the 5.25% discount rate or that this rate did not produce an after-tax benefit that was actuarially equivalent to (or better than) the benefit they had expected to receive. The EBC had guidelines for allowing a participant to change a lump sum election to an annuity election (and thereby avoid immediate taxation), or to rescind the 5+5 election and return to work, but none of the 5+5 participants who received excess benefits asked for such relief. Instead, Petitioners demanded that the EBC and/or their employer pay immediately the federal and state income taxes they owed as taxpayers on the excess benefits, and also pay their taxes on the earnings thereon for the rest of their lives. The EBC denied these claims.

## I. Course of Proceedings Below

Petitioners filed suit in state court alleging fraud and other state law claims. After Respondents removed the case to the District Court and remand was denied, Petitioners added a claim under ERISA Section 502(a)(3) (29 U.S.C. Section 1132(a)(3))for breach of fiduciary duty. In August, 1992, the District Court held that ERISA preempted the state law claims. 815 F. Supp. 1360 (D. Or. 1992). Following extensive discovery, the parties filed cross-motions for summary judgment based on a stipulated factual record. The District Court treated the motions as a bench trial on a stipulated record, 151 F.3d at 913 n.3, 815 F. Supp. at 1369, and proceeded to make findings of fact and conclusions of

*law and to enter judgment* for Respondents. In December, 1992, the District Court found that there had been no breach of fiduciary duty, and also held that Petitioners had not stated a claim for which relief was available under ERISA. 815 F. Supp. 1364 (D. Or. 1992). The Ninth Circuit reversed on the preemption issue, but affirmed the ruling that ERISA did not afford individual relief to Petitioners. 58 F.3d 1361 (9th Cir. 1995). In the 1995 appeal, the Ninth Circuit did not consider whether Respondents breached any fiduciary duties under ERISA. 58 F.3d at 1363-64 n.1.

On remand, the parties again filed cross-motions for summary judgment on the same stipulated record, addressing the impact of this Court's intervening decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). The District Court again entered judgment for Respondents. Opinion and Order (filed Sept. 3, 1996), Appendix A hereto at 12a, 13a. It held that Petitioners' state law claims were preempted in light of *Varity*, and reaffirmed its 1992 finding that Respondents did not breach any fiduciary duty.

On Petitioners' second appeal, applying a *de novo* standard to the District Court's factual findings, the Ninth Circuit panel found that Respondents breached their fiduciary duty to Petitioners, but affirmed because ERISA preempted Petitioners' state law claims and did not allow Petitioners to recover any of the relief they sought. 151 F.3d 908 (9th Cir. 1998), *amended*, 179 F.3d 1252 (9th Cir. 1999). In the course of reversing the District Court on the merits, the 1998 panel (disregarding the District Court's factual findings) found that Respondents had deliberately misled Petitioners. Two of the members of the panel then wrote opinions commenting on the restrictions imposed by *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255, 262 (1993), on ERISA remedies and

suggesting that the law should be changed — by Congress according to Judge Hawkins, or by the Ninth Circuit sitting *en banc* according to Judge Noonan. Judges Hawkins and Noonan then voted to rehear the case and requested extensive briefing by the parties on remedies issues — including the possible use of reformation (rewriting the Plan) and/or rescission (allowing Petitioners to return their lump sum benefits and awarding them back pay and either front pay or reinstatement). The parties filed letter briefs addressing these issues. Respondents also moved for leave to supplement the briefing on the issue of whether the panel had applied the wrong standard of review, and usurped the District Court's role by making findings of fact in conflict with the District Court's finding on the issue of fiduciary breach.

The panel ultimately rescinded the order granting rehearing, denied the motion for leave to supplement, denied rehearing, rejected a suggestion for rehearing *en banc*, and issued an amended order. The amended order concluded that on the facts before the panel, the relief sought by Petitioners was not "appropriate equitable relief" within the meaning of ERISA Section 502(a)(3) (29 U.S.C. Section 1132(a)(3)).

## REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

### The Ninth Circuit's *De Novo* Review of the District Court's Findings of Fact Conflicts With Rulings of the First, Fifth, Seventh, Eighth, and Tenth Circuits As Well As Its Own Precedent, and Fails to Follow Federal Judicial Procedure.

The Ninth Circuit applied a *de novo* standard of review, interpreting the ruling below as a summary judgment. 151 F.3d 908, 913. The panel did so even though the parties (after taking extensive discovery) had presented the case to the District Court for decision on stipulated facts, and the District Court explicitly made findings of fact based on the stipulated record. [3] The District Court stated:

> The parties indicate that they have submitted the same exhibits, depositions and affidavits that they would have submitted had this case been tried to

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3. This issue was properly preserved below by Respondents, who objected to the Ninth Circuit's *de novo* review of the District Court's findings of fact at every possible juncture. Respondents asserted in their Response to Petition for Rehearing With Suggestion for Rehearing *En Banc* that if rehearing were granted, the Ninth Circuit should rehear under the clearly erroneous standard its conclusion that a fiduciary breach occurred. In their letter brief responding to the Ninth Circuit's order granting rehearing, Respondents contended that the Court exceeded its jurisdiction in making the finding of breach of fiduciary duty because it contravened factual findings of the District Court that were amply supported in the stipulated record. And in their Motion for Leave to Supplement Briefing on Rehearing, Respondents again urged that the Ninth Circuit had erred in applying *de novo* review to the District Court's factual findings on fiduciary breach.

> the court. Thus, my opinion today constitutes both a ruling on summary judgment and, in effect, findings and conclusions.

815 F. Supp. 1364, 1369. In its September 3, 1996 order reaffirming the 1992 decision after remand, the District Court reiterated that its 1992 decision had been fact-based, stating that its "prior factual findings . . . stand undisturbed." September 3, 1996 Order at 12 (Appendix A hereto at 12a).

The panel's application of *de novo* review to the District Court's factual findings was squarely in conflict with decisions of the Ninth Circuit's sister Circuits unanimously holding that when a district court grants summary judgment in what is in essence a bench trial based on a stipulated record, the "clearly erroneous" standard of review applies to the district court's factual findings. *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 6 (1st Cir. 1997); *Allen v. United Mine Workers of America 1979 Benefit Plan & Trust*, 726 F.2d 352, 353 (7th Cir. 1984) (ERISA fiduciary breach case); *Nielsen v. Western Elec. Co.*, 603 F.2d 741, 743 (8th Cir. 1979); *Vetter v. Frosch*, 599 F.2d 630, 632 (5th Cir. 1979); *Sheet Metal Workers Int'l Ass'n v. Los Alamos Constructors, Inc.*, 550 F.2d 1258, 1265 (10th Cir. 1977); *see Acuff-Rose Music, Inc. v. Jostens, Inc.*, 155 F.3d 140, 142-43 (2d Cir. 1998) (summary judgment based on stipulated facts to be reviewed under F.R.C.P. Rule 52(a) rather than Rule 56).

Indeed, the panel's decision conflicts with well established precedent even in the Ninth Circuit. *E.g., Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999) (*en banc*), *cert. denied*, 68 U.S.L.W. 3106 (U.S. Nov. 1, 1999) (where trial judge makes findings of fact based on stipulated record, even though no live testimony presented,

"it completely changes our authority on review, from de novo review of summary judgment, to clearly erroneous review of findings of fact"); *Wolfe v. United States*, 798 F.2d 1241, 1243 n.2 (9th Cir. 1986); *see Ojai Unified School Dist. v. Jackson*, 4 F.3d 1467, 1472 (9th Cir. 1993) (where district court purported to make findings of undisputed fact, but actually rendered findings of fact on stipulated record, case treated as one tried on stipulated record). Thus, the panel's application of *de novo* review in this case ignored even the Ninth Circuit's own precedent.

Had the panel applied the correct standard of review, it would *not* have found that Respondents violated their fiduciary duty. The District Court found that the EBC's "decision *not* to address § 415 limitations in the 5+5 plan materials . . . was the product of an estimate that was simply not borne out — that is the numbers of affected individuals would be small and that the amount of benefits which would be nonqualified would be insignificant." 815 F. Supp. 1364, 1373 (emphasis in original). The District Court further found that the EBC's actions —

> . . . fell well within the 'prudent man' standard and the general duty to act in the interests of plan participants as outlined in [29 U.S.C.] § 1104. At most, with the benefit of hindsight, this was a tactical error in judgment which was mitigated by the caution to seek independent financial advice. The fact that [Petitioners] sought such advice and that no one caught the impact only confirms that this was not the kind of obvious, reckless oversight that might give rise to fiduciary liability.

*Id.* (footnote omitted). Moreover, the District Court noted that when the EBC discovered the error in its assumptions about

the impact of Section 415, it took prompt and effective action to mitigate the error, in the interest of Petitioners and contrary to the interest of the employer — an act that the District Court expressly found to have been "reasonable under the circumstances." *Id.* at 1374. For these reasons, the District Court found that Respondents did not breach any fiduciary duty.

The panel utterly ignored this finding of the District Court and the record evidence upon which it was based. The panel incorrectly concluded that "the record shows that one of the reasons that [Respondents] excluded information about the § 415 limitation was to save money." 151 F.3d at 914. The record showed no such thing. The Ninth Circuit's finding apparently was based on a single report (*id.* at 914-15), of which, the District Court found, *the fiduciaries who prepared the 5+5 disclosure materials were completely unaware*. 815 F. Supp. 1364, 1373. Had the panel reviewed the findings of the District Court for clear error, it would have found ample support therefor in the record and would have affirmed the District Court on the merits.

For appellate courts to review *de novo* factual findings made on a stipulated record, rather than for abuse of discretion, would work great mischief in federal appellate procedure. A litigant should not be able to try his case twice. The district court is much more familiar than an appellate court can be with the parties, the evidence, the witnesses, the issues, and the history of the case. "The rationale [for the clearly erroneous standard for review of factual findings is that] [t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). That is why the district court's findings of fact are

not to be disturbed unless they are clearly erroneous. The deference to be accorded to a district court's findings of fact is no less where the litigant has submitted the dispute to the district court on a stipulated record than where the case is tried with live witnesses. *See, e.g., Reich v. John Alden Life Ins. Co., supra*, 126 F.3d at 6; *Vetter v. Frosch, supra*, 599 F.2d at 632. In either event, the litigant has had his day in court, and the court of appeals does not have the authority to retry the case itself. As this Court has noted,

> [t]he parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level [by reviewing factual findings *de novo*] is requiring too much. . . . For these reasons, review of factual findings under the clearly erroneous standard — with its deference to the trier of fact — is the rule, not the exception.

*Anderson v. Bessemer City, supra*, 470 U.S. at 574.

## CONCLUSION

For the reasons set forth in their opposition to Petitioners' petition for writ of certiorari, Respondents contend that this Court should not accept this case for review. In the event that the Court grants the Petition, however, Respondents submit that, to accord fairness and complete justice in this case, the Court should also grant this Conditional Cross-Petition to clarify that an appellate court's review of a district court's findings of fact based on a stipulated evidentiary record is governed by the "clearly erroneous" standard, and should instruct the Court of Appeals to affirm the District Court's factual findings.

Respectfully submitted,

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# APPENDIX

**APPENDIX — OPINION AND ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED AND FILED SEPTEMBER 3, 1996**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 91-1186-MA (Lead)
No. 92-330-MA
No. 92-485-MA

DONALD J. FARR, et al.,

Plaintiffs,

v.

U.S. WEST, INC., et al.,

Defendants.

OPINION & ORDER

* * *

MARSH, Judge.

Plaintiffs filed these actions against their former employer, Pension Plan and Pension Benefit Committee claiming that defendants misrepresented the tax benefits of an early retirement program. In their complaints, plaintiffs assert claims for violation of fiduciary duties under ERISA and five separate state law claims for breach of contract,

breach of fiduciary duties, fraud, negligent misrepresentation and a statutory wage claim.[1] Plaintiffs seek to recover either the taxes paid on the non-qualified portion of their lump sum distribution or front and back pay from the dates they would have retired but/for defendants' early retirement offer.

On July 30, 1992, I granted defendants' motions for summary judgment against plaintiffs' state law claims finding them preempted by ERISA. Thereafter, the parties filed cross-motions for summary judgment on the remaining ERISA claims for breach of fiduciary duty. On December 24, 1992, in an opinion which constituted my findings and conclusions of law based upon the parties' stipulated facts, I held that defendants had not breached any fiduciary duties in their administration of the plan insofar as it related to plaintiffs' claims regarding tax advice. In the alternative, I also held that plaintiffs could not recover the individual relief sought under ERISA because: (1) ERISA limits recovery to the plan as a whole; and (2) the Ninth Circuit precluded the recovery of the type of extra contractual damages sought in this case.

On June 26, 1995, the Ninth Circuit reversed my holding that plaintiffs' common law claims were preempted by ERISA and affirmed my grant of summary judgment for defendants on the ERISA claim *solely* on the first alternative ground relied upon — i.e. that ERISA precluded individual recovery under § 1109 and 1132(a).

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1. A more complete recitation of the facts appears in *Farr v. U.S. West*, 58 F.3d 1361 (9th Cir. 1995) and my prior findings and conclusions set forth at 815 F. Supp. 1364 (D. Or. 1992), and thus will not be repeated here.

*Appendix*

Following the Ninth Circuit's decision and within a week of the filing of the mandate, the Supreme Court issued *Varity Corp. v. Howe*, __ U.S. __, 19 EBC 2761 (March 19, 1996). Both parties agree that *Varity* requires a re-examination of the Ninth Circuit's decision as new law which overcomes the law of the case doctrine. However, the parties disagree over *Varity's* implications and thus, they have again filed cross-motions for partial summary judgment on the limited issue of *Varity's* impact on this case.

## STANDARD

Summary judgment is appropriate if the court finds that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). There is no genuine issue of material fact where the nonmoving party fails "to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989).

The parties agree that no genuine issues of material fact exist and that the issues presented with these motions are purely ones of law for the court.

## DISCUSSION

The Supreme Court's recent decision in *Varity* has two critical impacts on the instant case — one direct and one indirect. The direct impact negates a portion of the Ninth Circuit's holding regarding the availability of individual

relief under ERISA, § 1132(a)(3). The indirect relates to the scope of the term "plan management" insofar as that term defines the extent of potential liability covered by ERISA. By broadly construing the term "plan management" to find ERISA coverage, the Supreme Court, in turn, implicitly broadened the doctrine of ERISA preemption.

In *Varity*, employee welfare benefit plan beneficiaries filed an ERISA action alleging that a plan administrator, who was also their employer, tricked them into accepting employment with a related but insolvent corporation with the intent of causing plaintiffs to lose their benefits. Plaintiffs alleged that corporate representatives falsely advised them that the related companies were solvent and that by changing employment both their jobs and benefits would remain secure. Following their transfers, the companies went into receivership and plaintiffs lost their jobs and benefits. Plaintiffs sought to recover the benefits they would have received but for their transfer to the new companies.

The employer in *Varity* argued precisely the opposite argument raised in this case by U.S. West — Varity argued that its challenged actions were made as an employer rather than as a plan administrator so as to avoid ERISA coverage. Here, U.S. West contends that, to the extent it acted at all, it acted as a plan administrator, not an employer, when it provided tax information about the 5+5 plan so as to gain preemption from state claims.

The district court found that Varity was acting as both a plan fiduciary and an employer when it made the alleged misrepresentations regarding the solvency of the new

companies and the security of plaintiffs' pension benefits. On review, the Supreme Court held that the factual findings supported the district court's ultimate conclusion that Varity had exercised discretionary authority "respecting the plan's management or administration" when it made the misrepresentations, thus forming the basis to sustain ERISA liability. *Id.* at 2765. The Court reasoned that information that reflected generally on the "likely future of plan benefits" fell within the definition of plan "management and administration." *Id.* at 2767. In so reasoning, the Court construed the concept of plan management broadly:

> "There is more to plan (or trust) administration than simply complying with the specific duties imposed by the plan documents or statutory regime; it also includes the activities that are 'ordinary and natural means' of achieving the 'objective' of the plan."

*Id.* at 2768.

After rejecting Varity's arguments against the scope of ERISA coverage, the Court examined the availability of individual relief under ERISA for breaches of fiduciary duty and held that such relief was available under 1132(a)(3), specifically rejecting the Ninth Circuit's contrary view as set forth in *McLeod v. Oregon Lithoprint*, 46 F.3d 956 (9th Cir. 1995).

The dissent argued that the Court's conclusion regarding individual relief under § 1132(a)(3) was inconsistent with prior Supreme Court precedent set forth in *Massachusetts*

*Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) and Congressional intent. The dissent also expressly disagreed with the majority's conclusion that ERISA applied to the facts of the case at all, contending that Varity's statements regarding the new companies did not constitute "plan administration." *Id.* at 2781.

My reading of *Varity* leads to two conclusions: (1) the construction of ERISA's §§ 1109 and 1132(a)(3) as restricting recovery to plan-wide benefits and rejecting claims for individual relief is no longer valid; and (2) the key to ERISA's application rests upon how broadly one defines "plan administration."

Plaintiffs correctly note that *Varity* did not address ERISA preemption, but instead focussed upon the applicability of ERISA to fraud claims against an employer. However, the Court's test for ERISA application in *Varity*, while fully consistent with the test utilized by the Ninth Circuit in determining whether plaintiffs' state claims were preempted in this case, would include much more within the term "plan administration," then would the Ninth Circuit in its opinion herein. While the key in both instances is whether the defendant's actions relate to plan management or administration, *see Varity*, 19 EBC at 2767; *Farr*, 58 F.3d at 1365, the Supreme Court construed the term "plan administration" broadly enough to encompass statements by an employer about the viability of a new company and the overall security of an entire benefit plan even though the statements did not directly relate to plan administration and even though the plans did not fail due to plan administration, but instead collapsed due to the new companies' insolvency.

The Ninth Circuit's holding that the defendants' statement regarding the tax consequences of plan benefits do not relate to plan management was premised upon a narrower understanding of plan management than was recognized in *Varity*. The tax consequences of the 5+5 plan clearly "relate to" plan administration because they are part of the overall mix of information relied upon by plaintiffs in making their decisions to opt into the plan. Like *Varity*, plaintiffs relied upon defendants' tax statements for making a decision affecting their job status and benefit package.

Further, the Ninth Circuit bolstered its conclusion by focussing upon the nature of the relief sought by plaintiffs — i.e. that the plaintiffs were not challenging the amount of benefits received since they had received all benefits due under the 5+5 program. The Supreme Court expressly rejected the damage-focus approach in *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990). There the Texas Supreme Court held that a plaintiff could maintain a common law wrongful discharge action against his former employer under a theory that the employer had terminated him to avoid pension contributions. The Texas Court had reasoned that such a common law claim was not subject to ERISA preemption under the theory that plaintiff was not seeking lost benefits, but instead sought lost future wages, emotional distress and punitive damages. The Supreme Court reversed, holding that the plaintiff's common law wrongful discharge theory "related to" an ERISA plan since the theory necessarily depended upon the **existence** of an ERISA plan. *Id.* at 139. Thus, even though plaintiff's claim raised no issues specifically related to the amount of plan benefits he was to receive or to the administration of a plan, his claims were

nevertheless preempted because they rested upon the existence of an ERISA plan. *See also Sanson v. General Motors Corp.*, 966 F.2d 618, 621 (11th Cir. 1992) (the existence of a pension plan subject to ERISA is the critical factor in ERISA preemption).

Finally, the Ninth Circuit's finding that this case is "on all fours" with the Eleventh Circuit's decision in *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 906 (1995) is questionable following *Varity*. The plaintiffs in *Forbus* were falsely induced to leave their employment upon misrepresentations regarding the company's viability. Forbus and others were told that a plant would be closing and that they had no choice but to participate in an early retirement program or they would lose their jobs and benefits. The plaintiffs accepted early retirement and thereafter learned that the plant remained open and that their former positions had been filled with new, younger workers. The Eleventh Circuit held that plaintiffs' claims for violations of the ADEA and state common law fraud were not preempted because they were entirely unrelated to the existence of an ERISA plan and instead related to the existence of their jobs. *Forbus*, 30 F.3d at 1406. Thus, the court in *Forbus* was able to address the preemption issue solely by way of the but/for the existence test of *Ingersoll*, without the need to address whether the claims related to plan management. In so holding, the Eleventh Circuit carefully distinguished a prior case which is factually far closer to the facts present here, *Sanson v. General Motors Corp.*, 966 F.2d 618 (11th Cir. 1992). In *Sanson*, plaintiff accepted a standard early retirement package upon representations that he would be ineligible for a special

retirement package if he remained employed and retired later. Plaintiff claimed that he later learned that he was eligible for the special package and filed an action for fraud alleging that he would not have accepted the standard early retirement package had he known the truth. The court held that because plaintiff's claims rested upon the existence of an ERISA plan, they were preempted. *Id.* at 621. Plaintiffs' claims in this case clearly hinge upon the existence of an ERISA plan. But for the existence of the 5+5 plan[2] they would have no claim against defendants for inadequate tax advice relative to plan distributions.

Based upon the foregoing, because the majority's decision in *Varity* expands the concept of plan administration relative to ERISA's coverage and because this is the same test utilized by the Ninth Circuit in determining ERISA preemption, I find that *Varity* provides new and different law on the issue of ERISA preemption applicable to this case. The test for the scope of ERISA coverage addressed in *Varity* is the same as the test applied to ERISA preemption. Under *Varity* and *Ingersoll*, plaintiffs' claims are premised upon the existence of an ERISA plan and relate to the broad concept of plan administration recognized in *Varity*. Thus, plaintiffs' common law claims are preempted by ERISA.

Plaintiffs argue that preemption does not end the inquiry and that their common law claims may nevertheless remain viable along with their ERISA claims since their theories of recovery under their common law claims are lodged against

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2. I found that the 5+5 plan constituted an ERISA plan in my July 20, 1992 opinion. 815 F. Supp. 1360. This finding was undisturbed on appeal. 58 F.3d at 1364, n.2.

U.S. West in its role as an employer rather than a plan fiduciary. Plaintiffs argue that *Varity* has no impact upon the "dual role" theory of liability and rely upon the Ninth Circuit's decision in *Sorosky v. Burroughs*, 826 F.2d 794 (1987). This reliance is misplaced.

In *Sorosky*, the plaintiff claimed that he was wrongfully discharged in violation of an employment contract requiring "just cause" and based upon age discrimination and his employer's intent to interfere with his pension benefits. The Ninth Circuit noted that not all employment discrimination claims are preempted by ERISA simply because the plaintiff also happens to be a plan beneficiary. The Court held that to the extent plaintiff claimed that his discharge was motivated by a desire to interfere with plan benefits, his claims were preempted. However, to the extent plaintiff's claims were premised upon allegation of age discrimination or the existence of a just cause contract, his claims existed independent of an ERISA plan and thus, were not preempted. *Id.* at 799-800. Thus, the court's decision was premised solely upon the relationship of the claims to the plan and not the dual role of the employer/plan administrator. Further, the non-preempted claims were premised upon a different set of facts than were the preempted claims.

A few district courts have recognized the dual relationship theory (employer/plan administrator) as an exception to ERISA preemption and allowed both ERISA and common law claims to proceed in tandem based upon a common set of facts, *see Greenblatt v. Budd Co.*, 666 F. Supp. 735 (E.D. Pa. 1987); *Sandler v. New York News, Inc.*, 721 F. Supp. 506 (S.D. N.Y. 1989). However, these

decisions have been soundly rejected by Circuit courts that have considered this issue directly. *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1219 n.3 (5th Cir. 1992); *Lister v. Stark*, 890 F.2d 941 (7th Cir. 1989). In *Christopher*, the plaintiffs alleged that they were induced to accept early retirement upon defendants' concealment of tax treatment information regarding lump sum distributions. The court rejected plaintiffs' attempt to segregate ERISA from common law liability based upon the defendant's dual role as an employer and plan administrator, since all of plaintiffs' claims were, in some respects, premised upon the operation of the pension plan. *Id.* at 1220.

Because all of plaintiffs' ERISA and common law claims are premised upon the same facts: the existence of the 5+5 plan and defendant's advice regarding tax consequences of plan, I find that the preemption doctrine applies and plaintiffs may not maintain separate common law actions against defendants as "employers" under a dual relationship theory.

This leaves plaintiffs' ERISA breach of fiduciary duty claims. Both parties agree that Ninth Circuit's ground for affirmance of my ruling granting summary judgment for defendants clearly cannot stand in light of *Varity*. However, because the Ninth Circuit did not address my prior factual findings that defendants in fact breached no fiduciary duties, those factual findings and conclusions of law still stand. Although plaintiffs urge that I reconsider these findings and conclusions, they offer no new evidence or convincing legal support for such reconsideration. Further, my conclusion that plaintiffs cannot obtain the relief sought was also undisturbed by the Ninth Circuit. Plaintiffs cannot obtain tax benefits

since these would constitute extra-contractual damages prohibited under the reasoning set forth in *Novack v. Andersen Corp.*, 962 F.2d 757 (8th Cir. 1992); plaintiffs cannot obtain front and back pay from the dates they would have retired but for the 5+5 offer since they have never offered to return the lump sums nor have they sought rescission.

## CONCLUSION

Based on the foregoing, I find that *Varity* sets forth new law affecting the Ninth Circuit's decision relative to plaintiffs' ERISA and common law claims. Following *Varity*, plaintiffs' claims against defendants "relate to" an ERISA plan since they depend upon the existence of an ERISA plan and relate to advice relative to plan administration. Although plaintiffs are clearly entitled to seek individual relief under § 1109 and 1132, my prior factual findings and conclusions of law relative to plaintiffs' claims for breach of fiduciary duty under ERISA stand undisturbed. The parties agree that no genuine issues of material fact exist and that the issues presented are purely ones of law for the court. Accordingly, defendants' motion for summary judgment (# 101) is GRANTED; plaintiffs' cross-motions for summary judgment (#103 and 105) are DENIED.

DATED this 3 day of September, 1996.

s/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

*Appendix*

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No. 92-330-MA
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U.S. WEST, INC., et al.,

Defendants.

JUDGMENT

MARSH, Judge.

Based on the record, IT IS HEREBY ORDERED AND ADJUDGED that this action is dismissed.

Dated this 3 day of September, 1996.

s/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge